

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION : Case No. 1:17-md-2804  
: Cleveland, Ohio  
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FINAL PRETRIAL PROCEEDINGS : *Tuesday, October 15, 2019*  
: 11:08 a.m.  
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TRANSCRIPT OF FINAL PRETRIAL PROCEEDINGS

BEFORE SPECIAL MASTER DAVID R. COHEN

Court Reporter: Donnalee Cotone, RMR, CRR, CRC  
United States District Court  
801 West Superior Avenue  
Court Reporters 7-189  
Cleveland, Ohio 44113  
216-357-7078  
[donnalee.cotone@ohnd.uscourts.gov](mailto:donnalee.cotone@ohnd.uscourts.gov)

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1 APPEARANCES:

2

3 On behalf of Plaintiffs:

4

5 **PETER H. WEINBERGER, ESQ.**

6 Spangenberg, Shibley & Liber  
7 1001 Lakeside Avenue, Suite 1700  
8 1900 East Ninth Street  
9 Cleveland, Ohio 44114  
10 216-696-3232  
11 pweinberger@spanglaw.com

12

13 **W. MARK LANIER, ESQ.**

14 6810 FM 1960 West  
15 Houston, Texas 77069  
16 813-659-5200  
17 wml@lanierlawfirm.com

18

19 **HUNTER J. SHKOLNIK, ESQ.**

20 400 Broadhollow Road, Suite 305  
21 Melville, New York 11747  
22 212-397-1000  
23 hunter@napolilaw.com

24

25 **JAYNE CONROY, ESQ.**

12 Simmons Hanly Conroy LLC  
13 112 Madison Avenue  
14 New York, New York 10016  
15 212-784-6400  
16 jconroy@simmonsfirm.com

17

18

19

20

21

22

23

24

25

1 APPEARANCES (Continued) :

2

3 On behalf of Plaintiffs:

4 **LINDA SINGER, ESQ.**

5 Motley Rice LLC  
28 Bridgeside Boulevard  
Mount Pleasant, South Carolina 29465  
6 843-216-9140  
7 lsinger@motleyrice.com

8 On behalf of Plaintiffs:

9 **DAVID I. ACKERMAN, ESQ.**

10 Motley Rice LLC  
401 Ninth Street NW  
Suite 1001  
11 Washington, DC 20004  
202-386-9626  
12 dackerman@motleyrice.com

13

14 On behalf of Defendant Cardinal Health, Inc.:

15 **ENU MAINIGI, ESQ.**

16 **STEVEN PYSER, ESQ.**  
Williams & Connolly LLP  
725 Twelfth Street, NW  
Washington, DC 20005  
17 202-434-5000  
emainigi@wc.com  
18 spyser@wc.com

19

20 On behalf of Defendant AmerisourceBergen Drug  
Corporation:

21 **ROBERT A. NICHOLAS, ESQ.**

22 Reed Smith, LLP  
Three Logan Square, Suite 3100  
1717 Arch Street  
23 Philadelphia, Pennsylvania 19103  
251-851-8100  
24 rnicholas@reedsmith.com

25

1 APPEARANCES (Continued) :

2

3 On behalf of Defendants Walgreen Co. and Walgreen  
Eastern Co.:

4

**KASPAR J. STOFFELMAYR, ESQ.**

5

**KATHERINE M. SWIFT, ESQ.**

6

Bartlit Beck LLP

7

54 West Hubbard Street, Suite 300

8

Chicago, Illinois 60654

312-494-4400

kaspar.stoffelmayr@bartlit-beck.com

kate.swift@bartlitbeck.com

9

On behalf of McKesson Corporation:

10

**PAUL SCHMIDT, ESQ.**

11

Covington & Burling LLP

12

The New York Times Building

13

620 Eighth Avenue

14

New York, NY 10018-1405

15

212-841-1171

16

pschmidt@cov.com

17

18

19

20

21

22

23

24

25

1                   MORNING SESSION, TUESDAY, OCTOBER 15, 2019

2                   (Proceedings commenced at 11:08 a.m.)

3                   - - -

4                   SPECIAL MASTER COHEN: All right. I've been  
11:08:50 5                   practicing my curve ball, and that's what I'm going to be  
6                   throwing today, a couple of those.

7                   I have some questions about where we are and where  
8                   we're going to go to, and how we're going to get through  
9                   this trial together.

11:09:07 10                  Some of the issues I'm going to raise I haven't talked  
11                  about with the Judge yet, and what we decide and what we  
12                  chat about will probably be to some extent repeated with the  
13                  Judge, but I want to see which way the wind is blowing on a  
14                  few things.

11:09:23 15                  First curve ball. Where are we in Track Two  
16                  discovery?

17                  MR. FARRELL: We have not yet begun. We are  
18                  waiting for you to wave the green flag. Paul Farrell.

19                  SPECIAL MASTER COHEN: I know that the parties  
20                  have submitted proposed case management orders, that there  
21                  has been submissions regarding, for example, temporal scope  
22                  and geographic scope, and other things. But I'm wondering  
23                  if anything has to be entered before those things can begin;  
24                  for example, written discovery.

11:10:16 25                  And let me tell you why I'm beginning with a curve

1 ball. This has been on my plate for a long time. I keep  
2 getting distracted by this trial, but it can't be the case,  
3 as the Judge has even pointed out to me, that we don't  
4 address this until the end of Track Two, and I keep getting  
11:10:37 5 distracted by everything that's going on with Track One, and  
6 so I'm starting with that, because we do need to get  
7 something going.

8 And I can put on something quick or I could just kind  
9 of release the Kraken, but we do need to do more than  
11:10:53 10 nothing, which is what we have been doing.

11 Would you please go to the podium?

12 MR. FARRELL: Paul Farrell.

13 So we've had discussions with defendants about the  
14 best way to proceed using the knowledge that we have from  
11:11:07 15 CT1. There's going to be a disagreement about whether --  
16 the geographic scope and the temporal scope, but it seems to  
17 me that that's a limitation on the underlying discovery  
18 requests.

19 I would suggest that we're probably in a place that we  
11:11:24 20 can exchange written discovery, and then pretty soon  
21 thereafter we're going to need guidance from you about how  
22 wide and how long ago that discovery goes back. But we're  
23 prepared to begin written discovery.

24 SPECIAL MASTER COHEN: Anybody from  
11:11:42 25 defendants?

1 MR. LYNCH: Mark Lynch from McKesson.

Special Master Cohen, the people who are mostly involved in Track Two issues are not here today, so I'm going to try to fill in for them.

11:12:00 5 SPECIAL MASTER COHEN: Thank you.

6 MR. LYNCH: I think our principal point is the  
7 parties that are in the trial don't think we should be  
8 messing around with Track Two discovery until the trial is  
9 over.

11:12:11 10 There are a good many defendants in the Track Two West  
11 Virginia complaint or Huntington and Cobble County complaint  
12 who were not involved in Track One. They could do a lot of  
13 productive work with them while this trial is going on if  
14 Mr. Farrell has spare time.

11:12:28 15 So we would recommend if you want to get something  
16 going before the end of this trial there's plenty to do with  
17 respect to parties who weren't in Track One and are not in  
18 this trial.

19 SPECIAL MASTER COHEN: What do you think about  
11:12:42 20 different deadlines for Track One defendants?

21 In other words, plaintiffs served their discovery,  
22 defendants served their discovery. Defendants, because they  
23 are occupied with Track One, those who are in Track One,  
24 would have a different deadline for response, but at least  
11:12:56 25 they begin to see what it is that's been requested.

1 I'd rather give you a heads-up.

2 MR. LYNCH: Yeah, I think that's workable.

3 Our main point is, give us a break until this trial is over  
4 for those parties that are in this trial.

11:13:12 5 SPECIAL MASTER COHEN: All right. Any other  
6 defense response?

7 I'm hereby authorizing the plaintiffs to submit  
8 written discovery that at this time is going to be limited  
9 in scope to the same as those limitations were in Track One  
11:13:29 10 with regard to width and depth, and that is to say, time and  
11 geography.

12 I can tell you that I have given more than zero  
13 thought to those questions, and I think that plaintiffs'  
14 arguments regarding geography and time should be more broad  
11:13:49 15 may be well taken to some defendants and not others, given  
16 the arguments that I've heard so far, but that's a very  
17 initial thought that I haven't completed.

18 In any event, I do think it's appropriate at this time  
19 for the plaintiffs and defendants both to serve written  
11:14:04 20 discovery, so you're free to go.

21 Okay?

22 MR. LYNCH: Special Master, what about the  
23 different --

24 THE REPORTER: I can't hear you. I'm sorry.

11:14:20 25 MR. LYNCH: What about the differential

1 deadline point that you suggested?

2 SPECIAL MASTER COHEN: Are you asking about  
3 deadlines for the service of discovery or the responding?

4 MR. LYNCH: Responding.

11:14:31 5 SPECIAL MASTER COHEN: So -- well, normal  
6 response times are 30 days, am I right, to written  
7 discovery?

8 MR. LYNCH: Right. Although, in a case like  
9 this, they're almost always extended.

11:14:54 10 SPECIAL MASTER COHEN: Right.

11 So let's say that it's 60 days for defendants who are  
12 not in trial in Track One and 120 days for defendants who  
13 are in trial on Track One.

14 MR. LYNCH: That sounds good to me.

11:15:15 15 SPECIAL MASTER COHEN: Thank you.

16 MR. LYNCH: Thank you.

17 SPECIAL MASTER COHEN: And that will be from  
18 today.

19 Okay. Next, I'll figure we'll try and talk  
11:15:25 20 settlement? Do you guys want to --

21 MR. PYSER: Special Master, the deadline from  
22 today or deadline from the day --

23 COURT REPORTER: Your name?

24 MR. PYSER: Steven Pyser for Cardinal Health.  
11:15:31 25 The deadline from --

1 SPECIAL MASTER COHEN: I'm sorry, the deadline  
2 from receipt.

3 MR. PYSER: Thank you.

4 SPECIAL MASTER COHEN: Okay. I need to pull  
5 up a document.

6 So there is a dispute that has to do with -- well, let  
7 me back it up this way.

8                   The original discovery deadline in this case was  
9 January 25th. And as you all know, despite valiant efforts  
10 and huge amounts of written discovery and depositions, and  
11 so on, nobody finished on the 25th, and so there was a  
12 period of time thereafter that I allowed additional  
13 discovery to be taken, additional supplementation of written  
14 discovery, and so on.

11:16:31 15 My recollection, and I'm asking you to remind me, is  
16 that there was a deadline for supplementation of written  
17 discovery, I think, of March 4th.

18 Does that ring a bell and sound right?

19 I see some heads nodding, nobody disagrees.

11:16:47 20 MR. ACKERMAN: Special Master Cohen -- David  
21 Ackerman -- that's correct.

1                   MR. ACKERMAN: I don't know that there was a  
2 set deadline --

3                   SPECIAL MASTER COHEN: David Ackerman.

4                   MR. ACKERMAN: Yeah. David Ackerman.

11:17:11 5                   I don't recall a set deadline that depositions had to  
6 be finished by. What I do recall are two separate  
7 deadlines. First there was a January 1st deadline, where  
8 you stated that you would not allow any additional requests  
9 for party depositions. And after January 25th, there  
11:17:31 10                  were -- there were depositions that went forward after that  
11 date based on agreement of the parties due to things like a  
12 witness unavailability prior to January 25th, or counsel  
13 unavailability.

14                   SPECIAL MASTER COHEN: Let me put it this way:  
11:17:48 15                  Were depositions done by March 4th? Were there depositions  
16 that occurred after March 4th?

17                   I'm seeing Kate say yes.

18                   MS. SWIFT: Kate Swift for Walgreens. There  
19 were a number of depositions that occurred after March 4th.

11:18:04 20                  SPECIAL MASTER COHEN: Roughly when did they  
21 end?

22                   MS. SWIFT: July.

23                   SPECIAL MASTER COHEN: And were those experts  
24 and fact?

11:18:11 25                  MS. SWIFT: There were at least fact

1 depositions. I don't recall whether -- there was a fact  
2 deposition that was two days, July 11th and 12th. I don't  
3 recall any expert depositions that late, but someone can  
4 correct me.

11:18:25 5 MR. ACKERMAN: David Ackerman again.

6 Special Master Cohen, as I recall, those depositions  
7 were DEA depositions, at least a number of them were in May  
8 and June.

9 SPECIAL MASTER COHEN: Okay.

11:18:37 10 So here's the reason I ask: McKesson is requesting  
11 depositions of three witnesses. I think that plaintiffs --  
12 and that's Bornstein, Johnson, and Howard. I think that  
13 plaintiffs are also asking for depositions of seven  
14 pharmacist witnesses, preceded by the argument that those  
11:19:13 15 seven pharmacist witnesses shouldn't be allowed at all.

16 And here's some rules that I'm thinking of applying  
17 which would resolve these issues, but I also don't want to  
18 take off the table the opportunity for the parties to work  
19 this out amongst themselves, which I know they've been  
11:19:35 20 trying to do, but it hasn't happened yet.

21 As far as I'm concerned, discovery is closed. It's  
22 been closed for a long time. That includes depositions. If  
23 y'all want depositions of witnesses yet to be called who  
24 weren't deposed during the discovery period, that's  
11:19:55 25 something you have to agree to, otherwise they don't occur.

1 I don't grant them.

2 It seems to me you had an opportunity during discovery  
3 to take deposition discovery, and there are by a factor  
4 probably of at least two folks you could have deposed, but  
11:20:12 5 strategically couldn't and didn't. I get that. But  
6 discovery is closed.

7 What that might mean is at trial you have to go  
8 bareback -- hi, you're trial attorneys -- which means that  
9 you would have to adduce evidence from witnesses at trial  
11:20:25 10 whom you haven't learned what they said before they got  
11 here. That's just the way it would go.

12 Another rule that I'm thinking might make sense, and  
13 I've suggested certainly with regard to documentary  
14 evidence, is if a witness wasn't disclosed during the  
11:20:43 15 discovery period, which I defined to be ending at March 4th,  
16 okay, because we all agreed that there was additional  
17 discovery, whether it was because I said so or you guys  
18 agreed to it, not January 25th.

19 So if a witness was identified during discovery before  
11:21:02 20 March 4th, that witness can be called. If that witness  
21 wasn't deposed, as I said, too bad, unless there's an  
22 agreement.

23 What I believe that means is that the seven pharmacist  
24 witnesses were identified before March 4th. What I believe  
11:21:22 25 that means is that Bornstein and Johnson were identified

1 before March 4th, but Howard was not, and so that's how that  
2 would play.

3 Now, there would be exception to that rule for  
4 compelling circumstances, and so if there is a witness who,  
11:21:50 5 for good reasons, is late identified after March 4th, and  
6 whose presence at trial would be required to have a fair  
7 trial, then that would be an exception, but that would be an  
8 unusual set of circumstances, and I'm guessing that Howard  
9 doesn't meet it. Howard wasn't identified until, I don't  
11:22:12 10 know, two, three weeks ago, and I'm not thinking that Howard  
11 is somebody without whom a fair trial couldn't occur.

12 Those two rules are entirely subject to Rule 3, which  
13 is, you can agree otherwise. You can agree to call  
14 witnesses who were not timely identified. You can agree to  
11:22:34 15 depose witnesses who weren't deposed during the discovery  
16 period. If you were to agree to that, then the deposition  
17 ground rules would also have to be agreed to.

18 But that's all subject to your agreement, and I'm  
19 happy to help you mediate those kind of, you know,  
11:22:56 20 resolutions; but it's against that context, it's against  
21 that background.

22 MR. ACKERMAN: Special Master Cohen, David  
23 Ackerman.

24 Again, for the record, in our objections we identified  
11:23:08 25 another five witnesses who were not disclosed during the

1 discovery period.

2 SPECIAL MASTER COHEN: Right. So let me  
3 finish.

4 MR. ACKERMAN: Oh, sure. Sorry.

11:23:17 5 SPECIAL MASTER COHEN: What I'm talking about  
6 now, thank you for reminding me, are only the seven  
7 pharmacist witnesses and the three witnesses McKesson wanted  
8 to depose. There are all kinds of other witness objections  
9 that I'm not talking about right now, I haven't gotten to  
11:23:32 10 them, frankly. And those objections are also being looked  
11 at by Judge Polster. He may rule on those shortly. I don't  
12 know what he's going to do with those. He may kick them to  
13 me, I don't know yet, but I haven't looked at them. I'm  
14 talking right now only about that grouping.

11:23:52 15 Having said all of that, I also think the pharmacist  
16 witnesses are different. There are different restrictions  
17 that would apply to them, and you all know the discovery  
18 history of the pharmacists of dispensing data, dispensing  
19 documents. To put it simply, oversimply, I said that  
11:24:23 20 dispensing-related information had to be produced only to  
21 the extent that it reflected on suspicious order monitoring  
22 systems on distribution, on diversion, and to the extent  
23 that it went beyond that, kind of down at the pharmacy level  
24 and actually dispensing practices, that that was not  
11:24:41 25 discovery that needed to be produced. And I said that all

1 at the instance of the pharmacy defendants.

2 And so what that means is that there has to be some  
3 sort of restrictions as to what the pharmacy witnesses can  
4 say, would be allowed to testify about, and that would be  
11:25:00 5 limited to SOMS, distribution, and diversion.

6 It's hard for me to tell certainly from the  
7 descriptions that you provide what the pharmacy witnesses  
8 will talk about. Walgreens says we will talk about pharmacy  
9 managing, and Cardinal says we will have the four CVS  
11:25:19 10 witnesses talk about whatever we need them to talk about in  
11 response to plaintiffs' case. I can't tell what it is  
12 defendants anticipate they will call those witnesses for and  
13 what they hope to elicit from them, but it will not be the  
14 case that they will get into the depths of dispensing unless  
11:25:38 15 it relates to SOMS.

16 Now, what does that all mean? I don't know. I'm  
17 giving you broad outlines for something we will have to  
18 figure out going forward. I can't answer questions that I'm  
19 sure you have right now about what exactly I mean, because I  
11:25:50 20 don't know. We're probably going to have to get together,  
21 and I'm going to somehow slice and dice what it is those  
22 witnesses would be allowed to say; which suggests that it  
23 might be a good idea to depose them so that I can understand  
24 what it is that y'all are trying to adduce.

11:26:08 25 But those are my thoughts on the pharmacy witnesses.

1           One other thing: You will recall long ago, and this  
2 kind of underlies all of this, that there were discovery  
3 disputes about specific prescriptions and specific orders  
4 and specific pharmacies, and how that all played out.

11:26:29 5           And Linda Singer sent a memo to the Court saying,  
6 look, this is what we intend to do. We intend to prove our  
7 case using an aggregate theory, but there are some things we  
8 would do also, and she laid those out. And that includes,  
9 for example, self-set restrictions on the extent to which  
11:26:54 10 anecdotal stores would be used, and that still adheres.

11           So y'all can go back and look at that memo, but the  
12 extent to which Bornstein, Howard, and Johnson are being  
13 called to talk about or any witness is being called to talk  
14 about a specific opioid experience, that's probably not  
11:27:14 15 allowed. So I'm reminding you all of that now.

16           Let me stop there and ask if there are any questions  
17 about any of that.

18           MR. SHKOLNIK: David, before depositions go  
19 forward -- I'm sorry, Hunter Shkolnik.

11:27:34 20           Before the depositions of any pharmacists go forward,  
21 wouldn't it be more appropriate if there was a proffer as to  
22 what they want these witnesses to be testifying to so that  
23 would help frame the issue for us going into these  
24 depositions. And knowing if they're really talking about a  
11:27:53 25 SOM system, that's one thing. If they're talking about,

1 well, we didn't fill this prescription or that prescription  
2 for this reason, that may be a different issue we're going  
3 to be covering.

4 So some type of real proffer, not a vague they're  
5 going to talk about their job and what we do in pharmacies.

6 SPECIAL MASTER COHEN: It sounds like a  
7 reasonable idea.

8 MR. STOFFELMAYR: Kaspar Stoffelmayr.

That might be a reasonable idea. I don't think we've agreed that there are going to be depositions at all. That may be part of this discussion you suggested we have. That sounds like an element of something we should be talking about, but that's one of a number of elements, and that goes to witnesses on both sides.

11:28:34 15 SPECIAL MASTER COHEN: Okay. Like I said,  
16 there are some answers I can give you. This is the extent  
17 of my thinking, and I know it needs more thinking and maybe  
18 more specific rulings.

19                   What I'm asking you to do, given what I've explained,  
11:28:45 20       to meet and see if you can't figure something out. It  
21        sounds like a proffer could be a good idea, it sounds like  
22        depositions might be a good idea, it sounds like some horse  
23        trading is possible. I suggest that you all pursue that.

24 Okay. So I mentioned that objections to witnesses is  
11:29:09 25 something that I'm not going to deal with any further today.

1       although the Judge may. I don't know.

2           Just a moment.

3           The parties have been -- and I think it's been mostly  
4       Kate Swift and Jane Conroy -- have been trading suggestions  
11:29:39 5     on as we go through trial the timing of the swapping of  
6       information, ranging from demonstrative exhibits to  
7       objections to exhibits, to identification of witnesses, and  
8       so on. And I think that you all have come to, as I  
9       understand it, as of 10:30 last night, agreement on all but  
11:30:02 10      the deadline for providing objections to exhibits that will  
11       be used the next day.

12           So here's the problem: The problem is that -- well,  
13       there's a couple of problems.

14           The first is that any agreement that y'all come to has  
11:30:22 15      to be agreed to by Judge Polster. He hasn't seen this. I  
16       have no idea whether he's going to agree to it. I'm going  
17       to suggest that most of it makes sense, and we can do it.

18           The part that I'm most concerned about is I haven't  
19       been told yet exactly what my role is going to be during the  
11:30:37 20      course of this trial and what he's going to ask me to do.

21           It may be that he asks me to rule on objections to  
22       exhibits, or it may not. I don't know. And I anticipate  
23       that that will probably evolve.

24           My concern is that if he says, hey, Cohen, you're the  
11:30:53 25      guy who's going to rule on these objections to exhibits, I

1       don't know that I can physically receive exhibits at 10:00  
2       the night before and rule on them on time the next day. I  
3       don't know that anybody can do it.

4                 If it's a few exhibits and they're simple issues, I  
11:31:10 5       could probably flip a coin and make it happen. But if it's  
6       a lot of exhibits, and there are complicated issues that  
7       actually might even involve some legal research, it probably  
8       can't happen, because I do sleep.

9                 So that one right there I already suspect just can't  
11:31:27 10      work. So what do we do? Well, I've been thinking a little  
11       bit about it, and you guys have bigger brains than I do, and  
12       I'm hoping we can come to some suggested ideas.

13                One example, we meet this Friday. I think we'll  
14       probably be done with jury selection by Friday. I actually  
11:31:48 15       think it will take one or two days, I don't think it will be  
16       three. Maybe I'm wrong.

17                We could meet Friday, and y'all could choose 200  
18       exhibits that you have objections to that you think are most  
19       likely to be used at trial and most likely to be objected  
11:32:02 20       to, and we'll go through them, and I will rule.

21                This is an approach that I undertook in the Welding  
22       Fumes MDL, and we did it, I think, nine times; beginning  
23       with something like 500 documents before the first  
24       bellwether trial, and it was down to maybe 150 to 200 by the  
11:32:22 25       ninth bellwether trial. But that process before the trial

1 began dealt with a bulk of documents that were the most  
2 important, and, of course, you begin to see which way the  
3 wind blows, and so you kind of figure out what to do with  
4 other exhibits.

11:32:37 5 Let me stop there and ask if that sounds like a  
6 reasonable idea. If anybody has any other ideas -- but the  
7 10:00 every night, I don't think works. I don't think it  
8 works for y'all, much less me.

9 MS. SWIFT: David, this is Kate Swift for  
11:32:50 10 Walgreens. Having not had much chance to talk with my  
11 colleagues about that, I think we'd be willing to work with  
12 something like that.

13 I would suggest that we start with plaintiffs' wish  
14 list of exhibits, if you will, and we'd need to receive them  
11:33:06 15 sometime before the Friday meeting so that we know what  
16 we're dealing with, and we can object appropriately, and  
17 respond to what they're trying to do.

18 SPECIAL MASTER COHEN: I mean, another thing  
19 that occurs to me is we can do something every Saturday  
11:33:18 20 morning with the coming week's documents. Maybe we could do  
21 both. I don't know.

22 MS. SWIFT: I believe the defendants would be  
23 open to both or either of those, but the key point is that  
24 we would need to receive the actual branded exhibits in  
11:33:34 25 advance so that we can look at them and know what we're

1 dealing with, and object.

2 SPECIAL MASTER COHEN: What I'm concerned  
3 about is that after three days it ends up being unworkable;  
4 now we're stuck. The Judge will not have the patience to  
11:33:46 5 keep the jury waiting in the jury room beyond the half hour  
6 he has reserved from 8:30 to 9:00, and is going to get the  
7 jury out there, which is what you want. So I want to make  
8 sure you get as many rulings as you can. Waiting until  
9 10:00 the night before I would suspect means you don't get  
11:34:07 10 rulings or you get un-nuanced rulings.

11 MR. LANIER: Mark Lanier. Thinking through  
12 the dynamics of this in terms of the way the trial will go  
13 forward, we've got 4,000 exhibits on our list.

14 The defendants have 20-some-odd thousand.

11:34:30 15 SPECIAL MASTER COHEN: If you want, I can cut  
16 them down again.

17 MR. LANIER: No. What my concern is, is  
18 starting then with the plaintiffs' means that out of the  
19 4,000, I guess we're supposed to select 200 that seem extra  
11:34:49 20 important to us and offer those 200 by Friday; or while  
21 we're selecting the jury, if they want them before Friday,  
22 so stop doing jury selection work and work on finding 200  
23 for them out of our 4,000, while they don't do anything with  
24 their 28,000 until somewhere down the road?

11:35:19 25 It strikes me that during the trial itself we'll

1 probably be dealing with two dozen exhibits a day, 24, maybe  
2 28, maybe 30.

SPECIAL MASTER COHEN: I'll take the over.

4 MR. LANIER: Okay. We will be producing the  
11:35:40 5 exhibits the night before that will be used in direct.  
6 We'll be flying blind on cross.

7 To the extent that the cross exhibits are in their  
8 28,000, which you would assume they are, maybe some are not  
9 for impeachment purposes and stuff, I can see them reaching  
10 outside the 28, we'll have to deal with those on the spot  
11 anyway during court to some degree, make our objections  
12 live, as we're seeing them for the first time. That will  
13 continue throughout the duration of the plaintiffs' case.

14 By the time we get to the defense case, a lot of their  
15 exhibits will have already been used in direct. So while we  
16 will be flying blind and doing it by the seat of our pants,  
17 as will the Court for their exhibits, they will have had the  
18 benefit of this type of an approach substantially so that  
19 they get their exhibits way ahead of time, they get to look  
11:36:45 20 at them, they get to get their legal team parsing through  
21 objections for nuanced rulings, et cetera.

22 All to say that it seems to me this is very one-sided  
23 to the advantage of the defense in this case when they  
24 already have the benefit of having six times the exhibit  
11:37:05 25 numbers that we do.

1           So if we were going to do this and make this selection  
2 choice, my suggestion might be that both sides come up with  
3 a list of 200 or so exhibits that they think would most  
4 likely be used, that you charge us in good faith to do that  
11:37:26 5 for the first week; and that we be prepared to do that week  
6 after week during the weekends, on a Saturday have a team  
7 meet with you, if that's what's deemed to be done.

8           I will represent to you and to the defendants that the  
9 way I try a case is very fluid, and depending upon what  
11:37:44 10 happens each day, it changes what I might want to do the  
11 next day, what I need to prove up, what I don't need to  
12 prove up.

13           I'm always looking for a way to make the trial as  
14 efficient and as short as I can, so I don't offer documents  
11:38:00 15 just because I said I might a week before. If I can do it  
16 another way and get somewhere more quicker, I'll pursue  
17 that.

18           So I like the idea, if you're going to do what you're  
19 doing, that it be documents from both sides, and that we  
11:38:17 20 still have in place a mechanism for the handful of documents  
21 that might come up, where at the end of court at 5:30 or  
22 6:00, when we get back to the hotel and start working on the  
23 next day we're able to say, in light of what's happened  
24 here, we need these three documents tomorrow. So that we  
11:38:36 25 can identify those by 8:00 p.m., and still have some

1 mechanism for having things looked at that didn't make the  
2 top 200 list for either before the week started.

3 SPECIAL MASTER COHEN: So you have two  
4 interests in tension. One is not showing the defendants all  
11:38:51 5 of the documents that you think are the most important and  
6 you expect to use. That's one tension. And the other  
7 tension is not wanting to interrupt trial with every exhibit  
8 that you object to so you can get a ruling, and now your  
9 four hours is down to two and a half because the Court has  
11:39:09 10 had to stop and get unhappy.

11 And what I'm trying to do is figure out -- I'm not  
12 disagreeing with you, Mark -- what I'm saying is I think  
13 there does have to be in the beginning some rulings that set  
14 people's expectations and make clear what exhibits will be  
15 allowed at trial so that we're not interrupting the Judge  
16 and you're not interrupting, nor are defendants  
17 interrupting, their presentation of their case.

18 Did you want to respond to that?

19 MR. LANIER: I think -- I think that that  
11:39:43 20 makes sense.

21            My concerns are a little bit more directed toward a  
22 different perspective. I just want to make sure that we're  
23 not locked into this Friday --

24 SPECIAL MASTER COHEN: No.

11:40:01 25 MR. LANIER: -- or Saturday producing the

1 exhibits that we're going to use for the next five days.

2 SPECIAL MASTER COHEN: So we would still have  
3 to have I'll call it an 8:00 deadline so that those  
4 additional exhibits, which you won't know when you give me  
11:40:15 5 the 200 you're going to be using because you didn't know  
6 until that day that you intend to use them tomorrow, and  
7 besides which, even if you picked the 200 perfectly, there's  
8 still going to be others, and the same for defendants.

9 That would be a supplemental examination of exhibits.

11:40:31 10 I'm not saying that doesn't happen. I'm saying that it  
11 makes that workload easier having front loaded it.

12 MR. LANIER: Okay. And I do like the idea of  
13 us getting a feel for how your rulings might be, which doing  
14 something this Friday or Saturday would give us a chance to  
11:40:47 15 do because that would inform us how to do objections during  
16 the trial.

17 But I, again, would urge that it be reciprocal, and  
18 that both sides put forward some exhibits for this weekend  
19 for you to look at Friday, or whatever day, to have this  
11:41:00 20 process so that they will also have an idea of when they  
21 pull exhibits out during cross-examination, they will get an  
22 idea of where your rulings might be, and we will get an idea  
23 so that we object appropriately to those documents.

24 SPECIAL MASTER COHEN: Right. And to be fair,  
11:41:15 25 so during the Welding Fumes trial there were, say, 500

1 documents, and I was clear when I wasn't sure, where I  
2 thought that this is something that may be so important to  
3 the parties that they should take it to the Judge.

4 And sometimes I would go to the Judge -- I'm not sure  
11:41:33 5 that we'll be able to do that on a Saturday -- but I would  
6 say, Judge, we went through 200 documents, here are 20 where  
7 the parties kind of want you to look at it, object to my  
8 tentative rulings, whatever.

9 And my point is I'm still the special master and you  
11:41:47 10 still have a judge, and you can still take my rulings to the  
11 Judge if that's something you need to do. I've gotten a lot  
12 smarter since then, so I'm hoping you won't need to as much.

13 MS. SWIFT: Kate Swift for Walgreens.

14 Just to respond to a couple of things that Mr. Lanier  
11:42:06 15 said. He represented a couple of times that the plaintiffs  
16 have 4,000-some-odd exhibits and that we have a much, much  
17 larger number than that. I don't believe that is correct,  
18 but it doesn't drive the bulk of my response, which is that  
19 I think we can work with you and work with the plaintiffs on  
11:42:24 20 a disclosure schedule that would get us to where we want to  
21 be. There may well be documents that we want you to rule on  
22 plaintiffs' objections to before opening statements, for  
23 example.

24 I think we would need to discuss what the number of  
11:42:39 25 documents is going to be that we're going to be disclosing

1 for you to look at Friday.

2 SPECIAL MASTER COHEN: Let's do that now.

3 I kind of like 200, and we meet on Saturday, from both  
4 sides.

11:42:50 5 MS. SWIFT: I'm not sure that 200 for  
6 plaintiffs and 200 for defendants makes sense necessarily.

7 SPECIAL MASTER COHEN: 600 for defendants?

8 MS. SWIFT: That's not where I was going.

9 (Laughter in courtroom.)

11:43:01 10 MR. PYSER: I'll take it on. This is  
11 Steve Pyser for Cardinal Health.

12 We were going to suggest that given that the  
13 plaintiffs will be putting on the bulk of their case that we  
14 start with a 200/100 split, and perhaps we reverse it when  
15 the defendants are putting on their case.

16 But as the plaintiffs, I suspect, in the early part of  
17 the case would be putting on more documents, it would make  
18 sense to start with a split that way, but the defendants are  
19 willing to put up documents.

11:43:36 20 MS. SWIFT: Kate Swift for the defendants.

21 The only other thing that I wanted to reiterate is the  
22 timing of disclosure is going to be very important to us. I  
23 think we're going to need at least 48 hours, and that could  
24 be reciprocal, of course.

11:43:51 25 And what we would ask for is the branded exhibits with

1 the exhibit stickers on them so we can look at what  
2 plaintiffs are actually talking about showing to the jury.

3 SPECIAL MASTER COHEN: When you say 48 hours,  
4 you're talking specifically for the Saturdays?

11:44:04 5 MS. SWIFT: Correct.

6 MR. LANIER: I think the Court's intention is  
7 that we start jury selection tomorrow. So tomorrow and  
8 Thursday are pretty filled up with the learning and knowing  
9 the panels of the 50 that will be coming in. And I'll be  
10 doing voir dire for the plaintiffs, and so I'm not in a  
11 position to stop doing that to locate 200 of the most likely  
12 exhibits that would be illustrative for --

16 MR. LANIER: Well, if we're going to do this  
17 on Saturday, then Friday at noon we can give you a list of  
18 200 of us, and we'll take their list of 200 Friday at noon.  
19 And I would assume they're going to use documents to  
11:45:04 20 cross-examine our witnesses. In fact, I suspect that  
21 they'll use as many documents if not more than we will.

22 But Friday at afternoon, assuming we can get the jury  
23 selected by Thursday, we can certainly do.

24 SPECIAL MASTER COHEN: Is Sunday a bad day?

11:45:24 25 MR. LANIER: Miss Conroy, would you be able to

1 do it on Sunday, the documents and objections?

2 MS. CONROY: Yes.

3 MR. LANIER: Ms. Conroy said she can do  
4 Sunday.

11:45:30 5 MS. SWIFT: Sunday is fine for us, David.

6 Everyone is in the same boat with respect to picking a jury  
7 tomorrow. We all have big teams. The deadline for  
8 producing branded exhibits has long since passed. I think  
9 it's appropriate for us to have 48 hours to look at the  
11:45:47 10 documents we're talking about, but Sunday is fine.

11 SPECIAL MASTER COHEN: All right. One second.

12 MS. SWIFT: If I may, David. One of my  
13 colleagues has raised an issue that I want to raise to you.

14 The only potential issue with Sunday is if we have  
11:46:22 15 issues with documents that we want to raise to Judge Polster  
16 before opening statements. It's unclear to us whether we'll  
17 have enough time to do so.

18 SPECIAL MASTER COHEN: You wouldn't have that  
19 time if we did it Friday or Saturday. That probably is  
11:46:35 20 going to have to happen via e-mail Sunday evening or 8:30 on  
21 Monday morning.

22 All right. 200 exhibits from defendants, 200 exhibits  
23 from plaintiffs, close of business Friday, branded. We will  
24 meet Sunday.

11:46:59 25 Not that this makes any difference to me, but am I

1 correct, there is no Browns game on Sunday?

2 I guess there might be some American League  
3 championship series games on, but I haven't had time to  
4 watch any of those.

11:47:16 5 So we'll say Sunday at 1:00. We'll need a location.  
6 Obviously, the Court is closed, and my office can't quite  
7 fit us all.

8 Any ideas? Anybody with a law office?

9 MR. SCHMIDT: This is Paul Schmidt from  
11:47:32 10 McKesson. We can host at our colleagues here in the  
11 compound connected to the hotels at Ulmer & Berne.

12 SPECIAL MASTER COHEN: I'm sorry, where?

13 MR. SCHMIDT: Ulmer & Berne.

14 SPECIAL MASTER COHEN: Would you do me the  
11:47:43 15 favor of sending me an e-mail with directions and what door  
16 to go to, and all that stuff, so that everybody can use  
17 that?

18 MR. SCHMIDT: Yes. And we'll probably need  
19 names as well, but we'll send an e-mail and copy plaintiffs'  
11:47:58 20 counsel, as well.

21 SPECIAL MASTER COHEN: Okay, Sunday at 1:00.

22 Okay. Thank you for all of that.

23 And I think we do need to make the daily cutoff at  
24 8:00, not 10:00. And again, this is still all subject to  
11:48:21 25 Judge Polster's approval.

1 MS. SWIFT: Kate Swift for defendants.

2 David, when you say 8:00, not 10:00, you mean for any  
3 additional objections that we're going to submit to you the  
4 night before?

11:48:34 5 SPECIAL MASTER COHEN: Correct. We will still  
6 be doing a daily. This is just front loading some of those  
7 to try and keep that shorter.

8 MS. SWIFT: I appreciate that. My question,  
9 presumably we'll need to move back the deadline for serving,  
11:48:47 10 move earlier in the day deadline, if we're serving those  
11 exhibits, which is currently, I believe, 8:00. I'd suggest  
12 two hours earlier, which is already going to be pretty  
13 tight.

14 SPECIAL MASTER COHEN: Does 6:00 work? I  
11:49:01 15 mean, is that even possible?

16 MS. CONROY: Jayne Conroy for plaintiffs.  
17 That's just the practical problem we had. We leave  
18 court, we can't even get back to the hotel until about 6:00  
19 after we make sure the exhibits are set for the day that  
11:49:13 20 we've been in court. It's just too soon. That's why 8:00  
21 seems to be about the earliest we could do it.

22 Are you doing hand signals there? 7:00.

23 MR. LANIER: 7:00 gives us one hour when we  
24 get back.

11:49:36 25 90 percent of the cases we try, you wind up making

1       objections on the spot, so I would think giving them an  
2       hour --

11:49:46 5 MS. SWIFT: I want to put on the record that I  
6 think an hour is too tight. We're trying to be reasonable  
7 and live in a world that's possible.

14 So let's shoot for 7:00 and 8:00.

11:50:15 15 MR. PYSER: Steven Pyser for Cardinal Health.

16 We'll certainly try to meet that. The problem that

17 we've got is it's often going to be that there's six

18 defendants who have to coordinate on objections, because

19 what we don't want to do is send you six e-mails with sets

11:50:31 20 of objections that are all over the place.

21 So it's that coordination built in that I think is as  
22 practical matter makes an hour on the defense side really --

11:50:45 25 MR. PYSER: But we'll try to hit the deadline.

1 I just want to flag that as a practical problem.

2 MR. SCHMIDT: Just logistically -- this is  
3 Paul Schmidt from McKesson.

4 May we get the actual exhibits as opposed to --

11:51:00 5 THE REPORTER: I can't hear you.

6 MR. SCHMIDT: May we get the actual exhibits  
7 as opposed to a list where we need to go try and find them?  
8 Because that can sometimes take time.

9 MR. LANIER: I think that if we make copies of  
11:51:12 10 the exhibits and then send the exhibits over, and we're  
11 doing all of that within the one hour that it's going to  
12 take for us to make the decision, I don't know how we do  
13 that. But I will tell you that if they're ones that we have  
14 ready copies of we'll be glad to send you electronic copies.  
11:51:29 15 If it's like a video that's going to be played, that's  
16 probably already readily accessible.

17 We're going trying to make it easy on y'all. We're  
18 not trying to make it difficult on you or the special master  
19 or the Court. So I'll represent to you, if I've got them  
11:51:46 20 I'll give them to you, but if I don't, and I'm just right up  
21 against the 7:00 deadline, I assume you would rather have  
22 the numbers than me call you and say, I've got the numbers,  
23 but it's going to take us 45 minutes to pull them and e-mail  
24 them.

11:52:00 25 We'll do the best we can. We're not trying to play

1 difficult ball. By the same token, I'll represent to the  
2 Court if they're 10 minutes late or 30 minutes late on their  
3 objections, or they think of a new objection the first thing  
4 the next morning, we're not going to say gotcha. We're not  
11:52:19 5 doing that. We're trying to get it right.

6 SPECIAL MASTER COHEN: Frankly, it seems to me  
7 you should be in a position to hear a branded exhibit number  
8 and pull it up. I just can't believe that you guys aren't  
9 in a position to do that. So that should come first. If  
11:52:34 10 y'all you can make it easier for each other and shoot PDFs  
11 across the Internet and say this is what we're using  
12 tomorrow, great.

13 But honestly, I think that the Exhibit List Number  
14 would be sufficient.

11:52:44 15 MS. SWIFT: Kate Swift for defendants.

16 I would agree with that if we were confident that we  
17 have the branded exhibits for the plaintiffs. I am not  
18 confident that we do. That is the nature of the request, to  
19 make sure that we have the branded exhibits that we're  
20 talking about. Certainly if it's a branded exhibit that  
21 we've got, that should be sufficient, but we've been trying  
22 to get branded exhibits for a while.

23 MR. ACKERMAN: Special Master Cohen. It's  
24 David Ackerman.

11:53:07 25 Just to respond to that, we have served a number of

1 branded exhibits. We have the same concerns about  
2 defendants' side, because we are daily receiving updated  
3 exhibit lists with new exhibits, but that's obviously  
4 something, as Mr. Lanier stated, we're going to work out.

11:53:27 5 SPECIAL MASTER COHEN: I expect you will.

6 The only other thing I want to chat about before we  
7 take a break and then head upstairs to meet with the Judge  
8 are depo designations.

9 MR. LANIER: Your Honor, may I interrupt the  
11:53:48 10 flow for just a moment?

12 MR. LANIER: At this point we've gone through,  
13 and I can announce to the Court that we've reduced down our  
14 plays substantially.

11:53:59 15 It is our intention to play the Prevoznik and the  
16 Hartle depositions, and those will be the only depositions  
17 we play. So that will change the dynamic, perhaps, of what  
18 you're going to tell us.

22 MR. LANIER: Yes, sir.

23               If during impeachment a line in a deposition becomes  
24 relevant, then that would be a different matter. If a  
11:54:27 25 witness, for example, if I've got the Cardinal, one of the

1       Cardinal witnesses on the stand, and they say something that  
2       flies in the face of what's been said in a deposition, we  
3       might need to use a line or two for impeachment purposes.  
4       But in terms of an affirmative play, we intend to play only  
11:54:46 5       from Prevoznik and Hartle.

6                   MS. MAINIGI: For the entirety of your case,  
7       Mark?

8                   MR. LANIER: Yes, Enu.

9                   SPECIAL MASTER COHEN: Well, that made a large  
11:54:56 10       problem smaller.

11                  So what I've --

12                  MR. LANIER: I'm not saying that there still  
13       aren't issues because the defendants have designated a  
14       boatload, and everything that they're concerned about are  
11:55:09 15       natural good concerns that we also share. So we do want to  
16       make sure that we have restrictions on when and where and  
17       how we get their real plays, but ours are reduced down.

18                  SPECIAL MASTER COHEN: I'm sure there are  
19       still objections to, you said Prevoznik, and I'm sorry, who  
11:55:34 20       was the second?

21                  MR. LANIER: And Hartle. And our Prevoznik  
22       play is probably going to run less than one hour, so it  
23       won't take long to do those objections. Hartle is an hour  
24       to an hour and a half.

11:55:47 25                  SPECIAL MASTER COHEN: Are the parties ready,

1 have they done what they need to give me the color-coded  
2 PDFs that I keep wondering when I'm going to get?

3 MR. LANIER: We can certainly provide those to  
4 you today.

11:56:02 5 MR. PYSER: This is Steve Pyser for Cardinal  
6 Health.

7 I think we'd want to take a look back at the Prevoznik  
8 one and make sure that it's ready, and that all the  
9 objections are properly entered. So we'll get working on  
11:56:11 10 that now that we have a much more narrower scope.

11 SPECIAL MASTER COHEN: All right. Well, that  
12 takes care of my concerns for the immediate future.

13 As Mark notes, that doesn't resolve all of the issue  
14 because I still will need, I assume during the course of  
11:56:27 15 trial, to receive objections to deposition designations that  
16 defendants want to play during their case, but that's a few  
17 weeks away, I assume.

18 And my concern has always been that the volume  
19 of -- look, I don't want to have to rule on objections to  
11:56:47 20 deposition designations that are never going to be played.  
21 I have too much to do, and so do y'all.

22 I'm looking at defendants now. I wrote a firm e-mail.  
23 You know, I prefer to be conciliatory, but I know how not to  
24 be. And so I wrote a firm e-mail, and I appreciate  
11:57:06 25 plaintiffs' response to that.

1 And I do need the defendants to kind of step up and  
2 come to a similar place so that I'm not ruling on a  
3 huge -- so the Court isn't ruling on a huge amount of  
4 deposition designations that never get played, and to do  
11:57:23 5 unnecessary work. And I promise you that if the Judge gets  
6 wind of that's what's going on, either because he's been  
7 asked to or he knows that I've been asked to, it's going to  
8 get ugly, quick.

9 MS. SWIFT: Kate Swift, Your Honor.

11:57:37 10 For Walgreens, we've only designated affirmatively  
11 from one witness, and it's their narrowed designation, so I  
12 don't anticipate it being a problem. But more broadly --

11:57:49 15 MS. SWIFT: Well --

16 SPECIAL MASTER COHEN: If there's a line of  
17 defense, counsel, you're stepping backwards, and everyone  
18 else is left up front. I get it.

19 MS. SWIFT: This is contemplated in the  
11:57:59 20 disclosure schedule that we've been trading back and forth  
21 with Ms. Conroy. And I guess I have a question for you,  
22 which is, does the time frame, the disclosure schedule that  
23 we've laid out for deposition designations, get you to where  
24 you want to be on having everything reduced down  
11:58:15 25 sufficiently. Which is to say, we've contemplated having

1 folks disclose final designations the Wednesday before the  
2 week they would be played, with final counters and  
3 objections served two days later on Friday, so that we have  
4 the final cuts, including the video, by the Friday before  
5 everything is to be played?

6 SPECIAL MASTER COHEN: That's a good point.  
7 The answer is mostly, and I say mostly because I don't  
8 really know what that ends up leaving me to do over a  
9 weekend, when I actually like to reintroduce myself to my  
10 wife sometimes.

11 So again, I'd like to front load the cutting back of  
12 what is clearly excessive. You got one, great; other  
13 defendants have 40, they can't possibly play 40. It needs  
14 to start getting cut back now, as plaintiffs have done. And  
15 you can do it voluntarily in the next few days, or I can  
16 finally just explode and draw a line in the sand that you  
17 won't like, and I'd much prefer not to do that.

18 MS. SWIFT: We will get to work on it again  
19 and cut it back.

11:59:31 20 SPECIAL MASTER COHEN: All right. I think  
21 that's enough said at this point.

22 There are a couple of other issues that are floating  
23 around; for example, the OIG report. I haven't read all the  
24 e-mails related to those, and I'm not prepared to rule on  
11:59:48 25 that now.

1           And it is noon. What I'm thinking is we'll take a  
2       15-minute break and head upstairs. The Judge is prepared  
3       for you to walk in a little after noon, so why don't we make  
4       it 12:15.

12:00:01 5           But before we break, is there anything else that  
6       anybody wants to raise while we're here today?

7           MR. LANIER: Not for plaintiff.

8           MS. SWIFT: No.

9           SPECIAL MASTER COHEN: All right. See you  
12:00:13 10       upstairs. Thank you, all.

11                   - - -

12       (Proceedings adjourned at 12:00 p.m.)

13

14

15                   **C E R T I F I C A T E**

16

17       I certify that the foregoing is a correct transcript  
18       from the record of proceedings in the above-entitled matter.

19

20       */s/ Donnalee Cotone*                   15th of October, 2019  
21       DONNALEE COTONE, RMR, CRR, CRC                   DATE  
22       Realtime Systems Administrator

23

24

25